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No. 98-63

In The

Supreme Court of the United States

October Term, 1997

S. AUGUST FASONE,

Petitioner,

vs.

CLINTON TOWNSHIP, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS CLINTON TOWNSHIP, JOHN W. FROST, LARRY L. WILKES, PENNY S. PEMBER, RANDY STICKLE AND REBECCA CHRISTIAN

DAVID G. JENNINGS
Counsel of Record
BARBARA KOZAR LETCHER
ISAAC, BRANT, LEDMAN
& TEETOR
Attorneys for Respondents Clinton Township, John W. Frost, Larry L. Wilkes, Penny S. Pember, Randy Stickle and Rebecca Christian
250 East Broad Street, Suite 900
Columbus, Ohio 43215
(614) 221-2121

147792

(800) 274-3321 • (800) 359-6859

COUNSEL PRESS

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STATEMENT OF THE CASE

Petitioner Fasone seeks this Court's review by misrepresenting key facts and by artfully creating legal issues that were not important in or arguably even part of the proceedings below. In essence, petitioner is asking this Court to redecide the factual/evidentiary rulings of the courts below. Neither of the two legal issues presented for review were even discussed or ruled upon by the Sixth Circuit which decided that under all the facts: (1) petitioner's allegations did not rise to the level of an ethnic hostile work environment claim; and (2) that Fasone could not prove an ADA claim where he admittedly could not do the essential functions of a firefighter and the law provides that a small township is not required to create a new permanent light duty position.

A. Americans With Disabilities Act Claim

Clinton Township is a small Ohio township with a small force of firefighters. There are no light duty jobs in this small department. At various times over the years injured firefighters have been allowed (although not required by the collective bargaining agreement) to work short, temporary light duty periods of convalescence. Temporary light duty requests were denied if there was no present need for light duty tasks. Mr. Fasone admits he knew this, as he himself was once granted a temporary light duty assignment. If a small fire department required to create permanent non-firefighter light duty jobs every time an employee is injured, a costly force of non-firefighters would be created. In fact, the same day Mr. Fasone requested a permanent light duty assignment, another firefighter also requested permanent light duty. This is not a safety net issue. Ohio law protects its injured fire and police officers through the creation of a special statutory disability fund which has provided a permanent pension to Mr. Fasone.

Petitioner would have this Court believe that Clinton Township had an available permanent light duty job and failed to accommodate Mr. Fasone by placing him in the position. This is simply not true and this allegation has been soundly rejected by the lower courts. The Sixth Circuit specifically ruled that based on the record: "Fasone was unable to rebut defendants' evidence that there was no vacant position of fire prevention officer." (A2.)[1] When Fasone requested permanent light duty there was no full-time fire prevention officer position. The fire prevention duties (which would not even amount to a full-time position) were performed by active firefighters, and those firefighters were still required to function as on-company firefighters at any time. An officer temporarily assigned to fire prevention tasks is not in a light duty position.

Clinton Township denies any allegation that it somehow failed to interact with Mr. Fasone or treated him unfairly in any way. Fasone, whose doctor reported that he was totally unable to perform the duties of any job he was trained for, simply requested the creation of a new permanent light duty position. There was no such job available and Clinton Township had never created any such position in the past. Fasone was *not* seeking a week or two temporary light duty assignment; he was requesting permanent light duty status. Mr. Fasone admitted in his deposition that he was requesting permanent light duty, and admitted that in 1991, 1992 and 1993 there was no such thing as a permanent light duty position for someone to do fire inspections and clerical work. (Joint Apx. 49-50.) Mr. Fasone was told that there was no such light duty. Any expanded interaction between Fasone and Clinton Township could not have changed the reality that:

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1. Citations to the Appendix are to the Appendix in Petitioner's Petition. Other citations of facts are to the Joint Appendix filed by appellant Fasone in the Sixth Circuit Court of Appeals.

- Fasone was permanently disabled from doing any of the physical tasks required of a firefighter;

- There was no permanent light duty position at Clinton Township;

- There was no need for a permanent light duty position at Clinton Township;

- Fasone was not a qualified individual with a disability because he could not, with or without reasonable accommodation, perform the essential functions of his job; and

- Neither the ADA nor the EEOC guidelines require the creation of an entirely new job.

The bottom line is that no type of interaction could change the fact that Fasone could not do the essential functions of his job. Reasonable accommodations do not include the creation of a new job which does not even resemble the former duties of the employee. Thus, this "interactive" process issue is really no issue at all in this case. The Sixth Circuit did not even discuss or make any ruling on this argument. The district court found no reason to discuss the claimed issue either. The Sixth Circuit, as did the district court, correctly applied the facts of this case to the elements of an ADA claim. Petitioner is inappropriately asking this Court to reconsider the facts and redecide the case based on a legal issue which is simply not part of the lower court opinions.

Once established that there was no accommodation available to Fasone, any other legal or factual analysis is superfluous. The following undisputed facts relevant to the ADA claim are

provided as background as petitioner has mischaracterized and over simplified this case to the point of it being factless:

Fasone Was Totally Disabled from Doing the Essential Functions of a Firefighter

- Fasone was employed as a firefighter for Clinton Township from 1982 until the time he *retired* in July, 1993. (Joint Apx. at pp. 339-341, 350, 451.)

- Fasone claimed that a hip injury on December 16, 1992 caused him to be permanently disabled and unable to work as a firefighter. (Joint Apx. at pp. 337-338, 340, 368, 370.) However, Fasone admits he applied for a disability retirement in *October 1992* in which he was required to swear he was permanently disabled. At this same time Fasone was continuing to work as a front line firefighter until December 16, 1992. (Joint Apx. at 338, 340.)

- Two months later, on February 2, 1993, knowing he could *never* be a firefighter, Fasone requested *permanent light duty*. (Joint Apx. at 368, 370.)

- Fasone again applied for disability retirement on April 23, 1993 complaining that he was permanently disabled, and he received the retirement, there being a determination of disability rendering him unable to be a firefighter. (Joint Apx. at p. 338.) In Fasone's disability retirement application, both of his doctors (Dr. Halley and Dr. LaHue) submitted reports giving their medical opinion that Fasone was *totally* unable to perform the *duties of any* job Fasone was trained for. (Joint Apx. at p. 282.)

- On June 28, 1993, Fasone retired (Joint Apx. at pp. 343, 486) after using up all his employment benefits and being awarded his disability retirement. With disability retirement and workers' compensation, Fasone was receiving approximately $34,740 per year, mostly tax free, and probably netting more than he earned when he was physically able to work. (Joint Apx. at pp. 353, 356.)

There Was No Accommodation Available

- On February 3, 1993, knowing he could never be a firefighter, Fasone demanded that he be placed on *permanent* light duty. (Joint Apx. at pp. 368, 370.)

- At the time of this request, another firefighter also made a request for permanent light duty. (Joint Apx. at p. 369.)

- There has *never been* such a thing as permanent light duty at the Clinton Township Fire Department. (Joint Apx. at p. 362.)

- There is *absolutely nothing* in the record showing that Fasone ever requested anything but permanent light duty. Fasone admits that is all he requested. (Joint Apx. at p. 347, 368-370.) While plaintiff at length discusses fire prevention duties, there is no fact in the record showing Fasone ever *actually requested* creation of a full-time fire prevention job, not even in his self-serving affidavit. (Joint Apx. at pp. 157-160.)

- Light duty at Clinton Township over the years has consisted only of short, temporary periods of convalescence. (Joint Apx. at 665.) Fasone himself once was granted a temporary light duty assignment. (Joint Apx. at pp. 370-371.) Assignment of any light duty is purely at the discretion of the Township under the systems manual. The collective bargaining agreement gives firefighters no rights to any light duty. (Joint Apx. at pp. 97, 99-133.)

- When Fasone requested light duty from Fire Chief Stickle on February 3, 1993, Stickle (the new fire chief as of November 2, 1992) informed Fasone that there was no longer light duty in the fire service under Stickle. (Joint Apx. at pp. 97, 368-369.)

- When Fasone requested a permanent light duty assignment (Joint Apx. at p. 370), he had no idea whether there was any such light duty available. To the contrary, the fire inspection tasks, which do not amount to a full-time assignment, were assigned to Dick Fisher, then Lt. Stokes in February, 1993. (Joint Apx. at p. 625.) Those fire prevention tasks were *in addition* to those of a regular firefighter. *Id.* The Clinton Township Fire Department has performed fire inspections and other similar tasks over the years. Any employee assigned such responsibility would also be required to function as an on-company firefighter at any time. The position of Fire Inspector is not considered to be a light duty position. (Joint Apx. at p. 97.) There is no separate position of fire prevention officer;

rather, these duties were assigned to a regular full-time firefighter.

- Clinton Township's financial problems are well documented, even though Fasone stated "their budget problem is not my concern." (Joint Apx. at p. 374.) Clinton Township has had to close a firehouse, lay off firemen, has had every fire department levy fail, and has seen Township revenues decrease because of the closing of major businesses. (Joint Apx. at pp. 633-634, 687.)

- Petitioner deceptively states that there was a "funded" fire prevention position at Clinton Township that was vacant. (Petition for Cert., pp. 8, 20.) This is contrary to testimony that creation of such a position would require the addition of a full firefighter's salary and was not within the strained budget of the department. (Joint Apx. at pp. 689-691.) Further, fire prevention was *fully assigned* during the time plaintiff claims he was unable to be a firefighter. (Apx. at pp. 97, 625.)

B. Hostile Work Environment Claim

At the outset, the Clinton Township parties deny that there was any harassment of Fasone based on his ancestry. There are no agreed facts on this claim, only vague allegations by Fasone. In fact, this entire claim was an afterthought by Fasone's attorney — the hostile work environment claim was not even part of the original complaint. Fasone is a white American male, and neither of his parents are from Italy. The lower courts, on summary judgment, construed Fasone's

allegations favorably as if they were true. Based upon the courts' judgment, the allegations simply do not rise to the level of a constitutional hostile work environment claim. The ruling was an application of fact to law, and Fasone *does not challenge* the legal standards for hostile environment applied by the lower courts. Rule 10 states that it is the policy of this Court not to grant certiorari to reapply facts to a properly stated rule of law. It is also important to note that Fasone retired because of a disability, and the ending of his employment had nothing to do with the § 1981 claim, nor is it alleged.

Fasone takes issue with the Sixth Circuit decision on the basis of a misguided and unfounded allegation that the Sixth Circuit did not review all the evidence. First, there is absolutely nothing in the opinion of the Sixth Circuit which discusses or addresses the issue of the scope of evidence it reviewed deciding there was no basis for a hostile work environment claim. There is nothing in the record or in the Sixth Circuit decision from which it can be implied that the Sixth Circuit did not review all the evidence and allegations. Second, there is nothing in the Sixth Circuit decision which even discusses the legal issue petitioner wishes this Court to review. As a matter of fact, the claimed legal issue was not an issue in the Sixth Circuit.

The district court did discuss the *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994) issue, but its ruling is meaningless as the court *did* look at all the evidence. (07/23/96 Opinion, Petitioner's Appendix A12-A32.) The district court dismissed, via summary judgment, both the federal law § 1981 claim and the state law claim for hostile work environment. Ohio law discrimination and hostile work environment claims follow the exact same standards as Title VII claims and § 1981 claims. *Plumbers and Steamfitters Joint Apprenticeship Commt. v. Ohio Civil Rights Comm.*, 66 Ohio St. 2d 192, 196 (1981); *Barker*

v. Scovill, Inc., 6 Ohio St. 3d 146 (1983). The district court stated "all of the harassing incidents that occurred during Fasone's employment are potentially includable in his state claim." (A29.) Based upon the entire record of Fasone's allegations, the district court found that there was insufficient evidence as a matter of law to establish a hostile work environment based on ethnicity. (A26-A32.) Further, the district court reconsidered its ruling. (02/28/97 Opinion, A5-A11.) In this Opinion, the court specifically discusses additional "new" evidence submitted by Fasone (including conduct prior to 1991) and decided that it did not support an ethnic hostile work environment claim. (A11-A12.) There is *no* discussion in the Opinion that the court was limiting the scope of review of evidence in considering the federal § 1981 claim. As stated above, it would not matter anyway since the court was considering *all* evidence on the state law claim which has the same standard as the federal claim.[2] Had the court not limited the review of evidence on the federal claim (which cannot be presumed from a reading of the 02/28/97 Opinion) the court would have reached the same result in granting summary judgment on the federal claim because *it is the same ruling* as on the state law claim.

Aside from there being no legal issue for this Court to review, the hostile work environment claim was an application of fact to law, and there is no need for this Court to reconsider or redecide the factual allegations involved in this case. By way of background, the following facts are briefly provided to show that the decisions below dismissing the hostile work environment claim were soundly based:

- Fasone retired in July, 1993 due to disability. There is no allegation that there is any connection to ethnic harassment.

2. Petitioner admitted in his Sixth Circuit appellate brief that the district court "gave consideration to *all* of the abuse directed at Mr. Fasone." (p. 32 from Appellant's Final Brief.)

- The last allegation of any abusive conduct whatsoever was on April 23, 1992, ending more than one year before he retired.

- Fasone could remember only a few sporadic events/comments which he believed to be abusive during 1991 and 1992, all having to do with only *one person* and most of which having nothing at all to do with ethnicity or Italian heritage.

- Prior to this period, Fasone could only give vague and conclusory testimony about what he alleged to be abusive.

- His only corroborating witness, Mr. Legg (who himself had an employment squabble with the Township over workers' compensation), could not identify a single specific ethnic slur or joke that he had any personal knowledge of from 1989-1993 and could not identify any person as harassing Mr. Fasone. (Joint Apx., 514-516.)

There are certainly more facts in this fact intensive case. However, it is not respondent's intention to reargue the case, other than to point out that the claim has been vigorously disputed by respondents and to provide a summary to show the allegations simply do not rise to the level of a hostile work environment. Sporadic statements which may include innuendo or jokes, which may be offensive, do not themselves support a claim for hostile work environment unless the alleged conduct is pervasively hostile and abusive so as to interfere with the employee's work performance and sufficiently alter the conditions of employment. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). This is not a case which factually supports

such a claim, and the legal issue alleged by plaintiff has nothing to do with the outcome as discussed above.

REASONS FOR DENYING THE WRIT

Petitioner raises two issues as grounds for his petition seeking a writ of certiorari: First, may evidence of discrimination occurring before the 1991 amendment of 42 U.S.C. § 1981 be considered in determining whether an employer has engaged in an ongoing pattern of discrimination? Second, does an employer have a duty to interact with an employee in an attempt to find a reasonable accommodation under the Americans with Disabilities Act? Yet, neither issue was discussed in the Sixth Circuit's opinion. As a result neither issue was properly preserved for review by this Court. This defect is fatal and mandates that the petition for writ of certiorari be denied.

Nevertheless, even if the Sixth Circuit had considered the issues now asserted as grounds for granting a writ of certiorari to review its decision, these issues were not dispositive of the case below. This is not a proper forum to relitigate the facts or debate the sufficiency of the evidence. Rather, because the appeal is a matter of discretion, the Court's review is limited to cases which properly raise an important federal question. Petitioner has offered no compelling reason for this court to entertain the issues now being raised.

I.

HOSTILE WORK ENVIRONMENT

A. Petitioner's Basis For A Writ Fails Because The Lower Courts Did Look At All The Evidence In Dismissing The Federal And State Law Hostile Work Environment Claims.

First, there is no evidence that the Sixth Circuit did not look at all the evidence of the alleged discriminatory conduct. In its brief opinion, the Sixth Circuit merely commented on petitioner's claim of harassment and his ability to identify only a few specific discriminatory comments as support for holding that this evidence was "insufficient to establish a hostile work environment claim under either federal or Ohio law." (A3.) The Sixth Circuit made no distinction whatsoever between those alleged acts of discrimination occurring before the 1991 amendment and those occurring after. Accordingly, this issue has not been adequately preserved for review and the petition for writ of certiorari should be denied.

The district court considered only those alleged acts of discrimination occurring after the enactment of the Civil Rights Act of 1991 when it decided petitioner's Section 1981 claim. However, petitioner neglects to mention that the district court looked at all the evidence, including alleged discriminatory acts occurring both before and after the amendment, to rule on petitioner's state law discrimination claim brought pursuant to Ohio Rev. Code § 4112.02(A). (A29.) As noted by the district court, petitioner's state law claim of ethnic discrimination presented one main issue for adjudication. The district court was forced to decide whether the specific incidents of harassing conduct alleged by Fasone, when combined with his broad, conclusory and unsupported statements of daily harassment, are enough for a reasonable juror to infer that the harassment altered the conditions of his employment by creating

a hostile work environment. (A30.) As discussed earlier, the state law claim is the same as the federal claim, *Plumbers and Steamfitters, supra*; *Barker, supra.*

In initially deciding this issue, the district court looked at *all* of the alleged discriminatory conduct identified by petitioner and, after dividing the allegations into three different time periods, addressed the conduct alleged to have occurred during each time period. (A30-A31.) Applying the same standards and the same burden of proof, the district court nevertheless held that the alleged harassment did not alter the conditions of petitioner's employment to such a degree that it would be actionable. (A31-A32.) *See Delaney v. Skyline Lodge, Inc.*, 95 Ohio App. 3d 264 (Hamilton Cty. 1994), citing *Harris v. Forklift Systems, Inc.* 510 U.S. 17 (1993). The district court dismissed petitioner's state law claim as it did the claim brought under Section 1981. (A32.) The district court also reconsidered its decision a few months later looking at additional evidence, and without separating the federal and state claims, again held there was no hostile environment. Thus, if the district court failed to consider those alleged discriminatory acts occurring prior to the 1991 amendment to 42 U.S.C. § 1981 when it decided petitioner's Section 1981 claim, it was no more than harmless error. As evidenced by its ruling on the petitioner's state law ethnic discrimination claim, consideration of all the alleged discriminatory conduct, whether occurring before or after the 1991 amendment, would have yielded the same result.

B. What Is Claimed To Be The Sixth Circuit's Analysis Does Not Conflict With Decisions Of This Court And Other Courts.

Given the district court's ruling, implicitly adopted by the Sixth Circuit, that *all* of the alleged discriminatory acts, taken together, did not rise to the level necessary to establish a hostile work environment claim, this is not an appropriate case in which

to examine whether a continuing course of conduct beginning prior to the 1991 amendment and continuing after it, allows the court to examine the pre-enactment conduct. The Sixth Circuit's decision contains *no pronouncement* on this issue and, therefore cannot be in conflict with the decisions of the First and Eighth Circuits cited by petitioner. Again, it can only be presumed that the Sixth Circuit did look at all the evidence in holding that both the federal and state law claims for hostile work environment failed.

Assuming *arguendo* the analysis of the issue goes any further, there was no need to look back beyond November 1991 to evaluate a continuing course of conduct as suggested by petitioner. As noted by the district court, Fasone could identify only two specific post-1991 instances of alleged ethnic slurs directed at him over a one and a half year time span. Because only those acts which occurred after November 21, 1991 are actionable under Section 1981, and those two acts are woefully inadequate as a matter of law to support a hostile environment claim, the court was not required to look at the conduct which predated the enactment.

Even if this Court were to read the Sixth Circuit's opinion as petitioner has read it, the Eighth Circuit's opinion in *White v. Honeywell*, 141 F.3d 1270 (8th Cir. 1998) is not in conflict with the Sixth Circuit's opinion in this case. In *White*, the district court opinion was reversed because it excluded evidence of a discriminatory statement made by a supervisor in plaintiff's chain of command which was made prior to the enactment of the 1991 amendment. In *White*, the court noted that this statement, offered as background evidence, if believed by the jury, would have helped the plaintiff to demonstrate knowledge and an ongoing pattern of racial harassment linked to management. However, the court also agreed with the district court that the statement itself was not actionable conduct because it fell outside

the time limitations imposed on the actionable conduct for this suit. *White*, 141 F.3d at 1276. That is precisely what the district court held in this case.

The impact of the Civil Rights Act of 1991 on Section 1981 claims differed significantly from its impact on Title VII claims. To the extent the Act amended Title VII, it was only with respect to the remedies available for discriminatory conduct which was already actionable. In contrast, the Act's amendment to Section 1981 broadened the scope of the conduct actionable under Section 1981. Prior to the amendment, Section 1981 proscribed racial discrimination only in the context of making or enforcing employment contracts. In *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), this Court held that a claim of racial harassment was not actionable under Section 1981 prior to its amendment by the Civil Rights Act of 1991 because it involves conduct after the formation of the employment relationship. *Patterson*, 491 U.S. at 176-177. *Patterson's* bar against claims of racial harassment was also extended to harassment claims founded on the existence of a hostile work environment. *Hill v. Goodyear Tire & Rubber, Inc.*, 918 F.2d 877, 880 (10th Cir. 1990). The enactment of the Civil Rights Act of 1991 made conduct, previously not actionable, actionable.

This distinction becomes important when analyzing those cases which petitioner argues are in conflict with the Sixth Circuit's decision in this case. Both *Cunningham v. Kansas City Star Co.*, 995 F. Supp. 1010 (W.D. Mo. 1998) and *Russell v. City of Overland Police Dept.*, 838 F. Supp. 1350 (E.D. Mo. 1993) addressed the applicability of the additional remedies created by the 1991 amendment to the Civil Rights Act to cases involving conduct occurring prior to the amendment. In *Russell, supra*, a Title VII case, the court addressed the issue in response to a motion to strike the plaintiff's requests for liquidated and

punitive damages and for jury trial. There the court held only that where the conduct has been ongoing and continuous into the period following the enactment of the Civil Rights Act of 1991, the plaintiff is entitled to a trial by jury as to those claims, whether they occurred prior to the enactment or thereafter, and may be entitled to punitive damages. *Russell*, 838 F. Supp. at 1354. Whether the employer could be held liable for conduct occurring prior to the date of the enactment was not addressed in the opinion. In *Cunningham, supra*, where a Section 1981 claim was alleged, the court held that while continuous acts of discrimination occurring prior to the effective date of the amendment are timely, relief for such acts may only be given back to the limitations period. *Cunningham*, 995 F. Supp. at 1018. In this case, applying the reasoning from *Cunningham*, the court could look back no further than two years from the date petitioner filed his complaint for his claims to be timely under the applicable statute of limitations. *See Lundblad v. Celeste*, 874 F.2d 1097 (6th Cir. 1989).

The First Circuit opinion cited by petitioner also dealt with the remedial aspects of the amendment in a Title VII claim. The analysis used by the First Circuit in *DeNovellis v. Shalala*, 124 F.3d 298 (1st Cir. 1997) is consistent with that applied in the Eighth Circuit. In *DeNovellis*, the court held that the employee failed to offer sufficient evidence that discrimination was a factor in the adverse employment action taken after the effective date of the Civil Rights Act of 1991, as required to rely on the Act's damage provisions to recover for pre-Act adverse employment actions, under a serial violation or a continuing effects theory. In *DeNovellis*, the First Circuit affirmed the district court's opinion granting summary judgment to the defendant noting that while the plaintiff may have a triable issue as to liability for pre-Act discrimination, he had no right to a remedy under the law as it existed prior to the 1991 Act. *DeNovellis*, 124 F.3d at 306, 314.

Petitioner's reliance on *DeNovellis* underscores his intent to focus the Court's attention on the facts rather than the law. By contrasting the evidence presented by petitioner with that presented by the plaintiff in *DeNovellis*, petitioner does not demonstrate the alleged conflict. Rather, petitioner demonstrates that the case is fact-bound and not worthy of review by this Court.

Further, petitioner's contention that the Sixth Circuit's analysis failed to follow *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) and *United Airlines v. Evans*, 431 U.S. 553 (1977), is irrelevant. In *United Airlines*, this Court rejected the application of a continuing violation theory in a Title VII case in which a female flight attendant failed to file a timely claim when she was forced to resign her employment, in accordance with a policy of the airline, when she got married. That policy was later invalidated by the courts as a violation of Title VII. This Court held that she could not later challenge her forced resignation, once the time for doing so had long since passed, simply because a present act, perceived to be discriminatory, had occurred. *United Airlines*, 431 U.S. at 560. In *United Airlines*, this Court determined that "the critical question is whether any present violation exists." *Id.* The Court described the forced resignation as "merely an event in history which has no present legal consequences." *Id. Havens Realty* applied the continuing violation theory to the "neighborhood" claims of a black "renter" plaintiff and two "tester" plaintiffs, one black and one white, which challenged petitioner's continuing pattern, practice and policy of unlawful racial steering under the Fair Housing Act. *Havens Realty*, 455 U.S. at 368, 381. The Court's holding in *Havens Realty* was limited to Section 812(a) of the Fair Housing Act, 42 U.S.C. § 3612(a) which requires that civil suits be brought within 180 days after the alleged occurrence of a discriminatory housing practice. *Havens Realty*, 455 U.S. at 380. No broader application of the theory, as applied in *Havens Realty*, was suggested by this Court.

II.

AMERICANS WITH DISABILITIES ACT CLAIM

A. Undue Hardship Is Not An Issue In This Case. Reasonable Accomodation Is The Issue In An ADA Case And It Was Factually And Properly Decided Below.

Contrary to the position taken by petitioner, undue hardship is *not* an issue in this case. Petitioner mistakenly continues to maintain that Clinton Township had a fully funded slot available for a full-time Fire Prevention Officer. The facts do not support this conclusion and the Sixth Circuit completely rejected it. This Court does not take cases merely to correct factual findings made by the lower courts. As noted in Rule 10 of the Rules of the Supreme Court of the United States, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." In this case, the Sixth Circuit correctly concluded that petitioner was requesting that Clinton Township create a new position for him. (A2.)

Petitioner's statement that the "lower courts' acceptance of Clinton Township's conclusory assertions of undue hardship was an improper basis for summary judgment" (Petition, p. 17) is *not* what occurred in the lower courts. While the district court in its first decision discussed undue hardship, it specifically rejected the analysis as a dispositive issue in its reconsideration. (A7-A10.) The Sixth Circuit did not discuss undue hardship in its opinion. Thus, the resolution of petitioner's ADA claim in the lower courts did not turn on whether Clinton Township proved undue hardship. Rather, the courts' opinions were premised on petitioner's failure to prove a reasonable accommodation existed under the standard adopted by the Sixth Circuit in *Monette v. Electronic Data Systems Corp.*, 90 F.3d

1173 (6th Cir. 1996). *Monette* requires that the plaintiff employee bear the burden of showing that he is disabled and that, with or without a reasonable accommodation, he is "otherwise qualified for an existing position." *Monette*, 90 F.3d at 1186.

Petitioner was unable to overcome this initial hurdle because he admittedly could not perform the essential functions of his job as a firefighter and asked that he be given a permanent light duty position where no such position existed. As the Sixth Circuit noted in *Monette*, an employee has not met his burden, for example, where he requests indefinite leave until a position opens up or where he would require the employer to create a new position in order to accommodate his disability. *Monette*, 90 F.3d at 1187. Petitioner's request that he be given a permanent light duty position as a fire prevention officer was presumptively unreasonable in light of this standard. Thus, petitioner failed to establish his case and there was no need to address the issue of undue hardship. Neither the ADA nor the case law requires the creation of a new job.

While petitioner acknowledges that an employer need not create a new and unnecessary job for an employee who can no longer perform the necessary tasks of his or her own job because of a disability, that is precisely what he has repeatedly asked the courts to do. Petitioner's challenge to the lower courts' factual findings is misleading in that it completely disregards the Sixth Circuit's ruling that "there was no vacant position of fire prevention officer." (A2.) Based on this ruling the Sixth Circuit conclusively held that petitioner's proposed accommodation was not reasonable. (A2.) Petitioner cannot seriously argue that undue hardship must be proved by an employer in every ADA case. If such were the law, the request for the creation of a new job would raise a triable issue of fact in every case.

In essence, petitioner is asking this Court to reject the factual findings made by the lower courts. His citation to *Stone v. City of Mount Vernon*, 118 F.3d 92 (2nd Cir. 1997), *cert. denied*, 118 S. Ct. 1044 (1998), illustrates the weakness in his argument. The fire department suing the City of Mount Vernon in *Stone* employed 109 firefighters and maintained two "light duty" bureaus. *Stone*, 118 F.3d at 93. Unlike this case, during the relevant time period, two vacancies occurred in the Fire Prevention Bureau which could be considered "light duty." Yet, Stone was not considered for these vacancies because, like Fasone, he could not fight fires. *Stone*, 118 F.3d at 94. Those facts bearing on the Second Circuit's reversal of the grant of summary judgment in favor of the employer included the fact that no person assigned to either of the light duty bureaus had ever been called on to perform fire suppression functions, that some 15-20 firefighters were assigned to one of these bureaus following injuries, and that although most of the assignments were temporary, the 10-year and 20-year assignments of two of the firefighters showed that career placement in those bureaus was not unprecedented. *Stone*, 118 F.3d at 100. Because the plaintiff in *Stone* was able to establish his *prima facie* case by identifying a vacant position that would constitute a reasonable accommodation, the court then could evaluate the undue hardship issue. *Stone*, 118 F.3d at 101. That is the complete opposite of the case here.

The analysis used in *Stone* is no different than the one employed in this case. The only difference is the strength of the facts supporting Stone's claim that reassignment to a light duty vacancy was a reasonable accommodation. Where, as here, the petitioner asks this Court only to redecide various factual issues and has raised no legal issue for review, his petition for writ of certiorari should be denied.

B. Petitioner's Interactive Process Analysis Was Not An Issue Nor Even Addressed By The Courts Below. Reasonable Accommodation Is Always The Ultimate Issue And Petitioner's Cases Do Not Create New ADA Culpability Based On An Employer's Thought Process.

Finally, petitioner asks this Court to resolve a perceived conflict in how the federal circuit courts have viewed whether an employer has an obligation to engage in an interactive process with the employee to determine if a reasonable accommodation is possible. This case, however, does not create such a conflict because the Sixth Circuit did not decide this issue even though it was raised by petitioner below. Moreover, none of the circuits have held that a failure to engage in an interactive process in and of itself violates the ADA.

In those cases cited by petitioner, the courts have stressed the importance of communication and cooperation between employers and employees in seeking reasonable accommodation. *Deane v. Pocono Medical Center*, 142 F.3d 138, 149 (3rd Cir. 1998); *Mengine v. Runyon*, 114 F.3d 415, 420-421 (3d Cir. 1997). The courts have not imposed liability on the employer for failing to do so. In *Mengine, supra*, the court recognized that "if reasonable accommodation is impossible, nothing more than communication to the employee of this fact is required." *Mengine*, 114 F.3d at 420. To the extent the Third Circuit identified any problem associated with failing to engage in an interactive process, it was limited to the "*risk*" of violating the ADA associated with failing to discover a way in which the employee's disability could be reasonably accommodated. *Mengine*, 114 F.3d at 420-421; *Deane*, 142 F.3d at 149. In *Deane*, the issue was not a basis for the court's decision and was discussed merely by way of *obiter dictum*. Yet, *Deane* and *Mengine* were the two cases principally relied on by petitioner to support his claim that a conflict exists among the circuits.

The Fifth Circuit's treatment of the issue is similarly limited. In *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155 (5th Cir. 1996), while the court acknowledged that once an accommodation is properly requested, the employer has an obligation to participate in an interactive process in determining one, it did not reach this issue in deciding the case because the plaintiff never made a formal request for accommodation under the ADA. *Taylor*, 93 F.3d at 165. In *Taylor*, the plaintiff asked for only a reduction in his "objectives" and a lessening of the "pressure." *Id.* He did not mention that he had a bipolar disorder, any limitations resulting therefrom, or the need for any specific accommodation. *Id.* Thus, petitioner cannot rely on *Taylor* as a basis for establishing a conflict with respect to the issue of whether the employer must engage in an interactive process.

The Seventh Circuit has not imposed liability on employers merely for failing to engage in an interactive process. To the contrary, the Seventh Circuit rejected such a claim in *Miller v. Illinois Dept. of Corrections*, 107 F.3d 483 (7th Cir. 1997). In *Miller*, the court held that if a plaintiff cannot perform the essential function of the job even with a reasonable accommodation, there is no relief afforded by the ADA even if plaintiff can show an "improper motivation" by the employer. *Miller*, 107 F.3d at 484. Petitioner relies on *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667 (7th Cir. 1998), and several other cases out of the Seventh Circuit to suggest a conflict facially worthy of this Court's review. However, in *Dalton, supra.*, the Seventh Circuit found disputed issues of material fact with respect to two of the nine plaintiffs in part because the employer failed to respond in any way to the suggested accommodation proposed by these two plaintiffs. *Dalton*, 141 F.3d at 677. The Seventh Circuit did not suggest that the employer would be liable as a result. It only held that a jury should decide the feasibility of the proposed accommodation.

Id. Again, the ultimate issue of fact is whether there was a reasonable accommodation. *See also Valentine v. American Home Shield Corp.*, 939 F. Supp. 1376, 1401 (N.D. Iowa 1996) ("This matter will therefore proceed to trial, if at all, only on the reasonableness of part-time employment as an accommodation to Valentine's disability." *Valentine* involves a myriad of issues and is not applicable to this case.)

The thought process employed by Clinton Township is of no consequence. In *Willis v. Conopco*, 108 F.3d 282 (11th Cir. 1997), the Eleventh Circuit specifically rejected the argument that petitioner advances here. In *Willis*, the court held that the ADA does not require an interactive process to determine a reasonable accommodation for a disabled employee such that the employer could be held liable merely for failing to engage in the process itself, regardless of whether a reasonable accommodation could in reality have been made for the employee. *Willis*, 108 F.3d at 285. In *Willis*, the Eleventh Circuit stated that

> [t]he ADA, as far as we are aware, is not intended to punish employers for behaving callously if, in fact, no accommodation for the employee's disability could reasonably have been made.

Id. Otherwise, an employer would be liable for not investigating "even though an investigation would have been fruitless." *Id.*

There is no conflict among the circuits with respect to this issue and the Court should not strain to find one. However, even if the Court would determine that the conflict raised by petitioner does, in fact, exist, it is of no consequence because a failure to engage in an interactive process does not give rise to independent relief. The issue in every ADA case is whether a reasonable accommodation exists, and the level of interaction

cannot change the ultimate issue. To the extent petitioner seeks to add a *mens rea* element to the analysis, he invites the Court to impose civil liability on employers based only on bad thoughts. Such an invitation should be respectfully declined.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID G. JENNINGS
Counsel of Record
BARBARA KOZAR LETCHER
ISAAC, BRANT, LEDMAN
& TEETOR
Attorneys for Respondents
Clinton Township, John W. Frost,
Larry L. Wilkes, Penny S. Pember,
Randy Stickle and Rebecca Christian
250 East Broad Street, Suite 900
Columbus, Ohio 43215
(614) 221-2121